Filed 10/13/20 P. v. Schweitzer CA3
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. SCOTT ALLEN SCHWEITZER, Defendant and Appellant.	C086895 (Super. Ct. Nos. SCCR-CRF-2016-1304 & SCCR-CRF-2017-1251) OPINION ON TRANSFER

In a plea proceeding, defendant Scott Allen Schweitzer pleaded no contest or guilty to assault with a deadly weapon with a great bodily injury enhancement (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a)),[1] and two counts of brandishing a deadly weapon (§ 417, subd. (a)(1)). In a subsequent plea proceeding, he pleaded guilty to two counts of assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), possession of a controlled substance in jail (§ 4573.6), two counts of possession of

[1] Undesignated statutory references are to the Penal Code.

alcohol in jail (§ 4573.8), felony failure to appear (§ 1320, subd. (b)), five counts of resisting an officer (§ 148, subd. (a)(1)), battery (§ 242), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), misdemeanor failure to appear (§ 1320, subd. (a)), and admitted great bodily injury and strike allegations (§§ 12022.7, subd. (a), 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). He was sentenced to 15 years in state prison.

His sole contention on appeal is that his conviction should be conditionally reversed and the matter remanded to allow proceedings under the recently enacted section 1001.36 pretrial mental health diversion program.

We originally affirmed the conviction. Our Supreme Court granted review but deferred further action pending disposition in *Frahs*. (*People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*).) Following its decision in *Frahs*, the court transferred this matter back to us with directions to vacate our decision and reconsider the cause in light of *Frahs*. In *Frahs*, the court found section 1001.36 applies retroactively to defendants whose cases were not yet final when the Legislature enacted section 1001.36. (*Frahs*, at p. 640.) The court further concluded a defendant need only argue he suffers from a qualifying mental disorder to be entitled to a limited remand to allow the trial court to conduct a mental health diversion eligibility hearing. (*Ibid.*) As we are bound by our Supreme Court's decision in *Frahs*, we will conditionally reverse and grant a limited remand for the purposes of determining defendant's eligibility for mental health diversion under section 1001.36.

FACTUAL AND PROCEDURAL BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal. We summarize the relevant procedural facts as follows.

Defendant's first plea, the assault with a deadly weapon and two brandishing counts in case No. SCCR-CRF-2016-1304, was entered on November 17, 2016. The plea

included a *Cruz*[2] waiver. Defendant subsequently violated the *Cruz* waiver by failing to appear for sentencing, which led to new charges being filed. Defendant admitted the *Cruz* violation on January 31, 2017.

On February 14, 2017, defense counsel expressed doubts about defendant's competency to stand trial. The trial court referred defendant for a psychological evaluation pursuant to section 1369. According to the psychologists' reports, defendant had suffered brain damage, posttraumatic stress disorder (PTSD), and memory loss from an earlier gunshot wound to the head, which was compounded by early onset polysubstance abuse, but he was nonetheless competent to stand trial. Defendant had been awarded Social Security disability benefits as a result of his PTSD and his father was his caretaker. The trial court found defendant competent to stand trial and reinstated proceedings on March 14, 2017.

Defendant's second plea was entered on January 25, 2018. He was sentenced on March 1, 2018.

DISCUSSION

On remand from the Supreme Court, defendant contends we should conditionally reverse his convictions and sentence and remand the matter for the trial court to conduct a mental health diversion eligibility hearing under section 1001.36. We agree.

Section 1001.36 was enacted after defendant's sentencing (Stats. 2018, ch. 34, § 24, eff. June 27, 2018) and provides pretrial diversion may be granted if the trial court finds all of the following criteria are met: (1) the defendant suffers from a recently diagnosed mental disorder enumerated in the statute; (2) the disorder was a significant factor in the commission of the charged offense, and that offense is not one of the offenses enumerated in subdivision (b); (3) "[i]n the opinion of a qualified mental health

---

[2] *People v. Cruz* (1988) 44 Cal.3d 1247.

expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment"; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if treated in the community. (§ 1001.36, subd. (b)(1)-(2).) If the treatment under pretrial diversion is deemed successful, the charges shall be dismissed and the defendant's criminal record expunged. (§ 1001.36, subds. (b)(1)(A)-(C), (c)(3), (e).)

The statute further provides: "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3).)

In *Frahs*, our Supreme Court concluded *Estrada's* inference of retroactivity applies to section 1001.36 such that defendants with qualifying mental disorders whose cases are not yet final are entitled to limited remand for the trial court to determine whether they are eligible for mental health diversion. (*People v. Frahs, supra,* 9 Cal.5th at pp. 624-625; see *In re Estrada* (1965) 63 Cal.2d 740.) The court concluded "the possibility of being granted mental health diversion rather than being tried and sentenced 'can result in dramatically different and more lenient treatment.' [Citation.]" (*Frahs*, at p. 631.) The court therefore concluded "the ameliorative nature of the diversion program places it squarely within the spirit of the *Estrada* rule," and thus the program retroactively applies to defendants whose cases are not yet final. (*Ibid*.) That is the case for defendant here.

The *Frahs* court further rejected the People's argument the defendant there was not entitled to remand because he did not make an adequate showing of eligibility. (*People v. Frahs, supra,* 9 Cal.5th at pp. 637-638.) The People argued the defendant had to demonstrate he met all six threshold eligibility requirements before the appellate court could remand. (*Ibid*.) The court found imposing such a high bar for remand "would be unduly onerous and impractical" and "inconsistent with any sensible retroactive application of the statute." (*Id*. at p. 638.) Instead, the court concluded "a conditional limited remand for the trial court to conduct a mental health diversion eligibility hearing is warranted when, as here, the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion — the defendant suffers from a qualifying mental disorder [citation]." (*Id*. at p. 640.)

The Attorney General agrees that section 1001.36 applies to this case, but disagrees that remand is needed. According to the Attorney General, the appeal should be dismissed because defendant failed to obtain a certificate of probable cause, and remand is inappropriate because there is insufficient evidence he suffers from a qualifying mental disorder.

Section 1237.5 provides that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere," except where defendant has obtained from the trial court a certificate of probable cause. Despite this broad language, the Supreme Court has held there are some exceptions. The Supreme Court instructs that " 'courts must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." ' " (*People v. Buttram* (2003) 30 Cal.4th 773, 781.)

In *People v. Stamps* (2020) 9 Cal.5th 685 (*Stamps*), the California Supreme Court concluded that a certificate of probable cause was not required for a defendant to seek relief on appeal based on a change in the law that benefited a defendant because the defendant was seeking retroactive application of a subsequently enacted ameliorative

provision. (*Id*. at pp. 695-696.) The court also noted the defendant's "appellate claim does not constitute an attack on the validity of his plea because the claim does not challenge his plea as defective when made." (*Id.* at p. 696.)

The court explained that prior cases addressing the certificate requirement: "teach that when the parties reach an agreement in the context of existing law, a claim that seeks to avoid a term of the agreement, as made, is an attack on the plea itself. They do not, however, address the nature of a challenge based, not upon existing law, but on a subsequent change in the law. Defendant's appellate claim here relies on the principle that 'the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.' [Citation.] 'That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them' (*id*. at p. 66), and '[i]t follows . . . that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement' [citations]." (*Stamps, supra,* 9 Cal. 5th at pp. 695-696.) The Supreme Court thus held in *Stamps* that a defendant who entered into a plea with a stipulated sentence was entitled to the retroactive application of a change in the law authorizing the trial court to strike a serious felony enhancement notwithstanding the defendant's failure to obtain a certificate of probable cause. (*Id.* at p. 692.)

The Attorney General contends *Stamps* is inapposite because it addresses a change in the law regarding the defendant's sentence rather than the case here, a change in the law which could effectively negate the entire plea if defendant obtains diversion. We disagree. The case cited by the Attorney General for the proposition that a challenge to the validity of the plea must be preceded by a certificate of probable cause is to a case that predates *Stamps* and does not involve the retroactive application of a change in the law. (See *People v. Johnson* (2009) 47 Cal.4th 668, 673 [certificate required for claim of

ineffective assistance regarding a defendant's request to withdraw from guilty or no contest plea].)

While, as the Attorney General points out, *Stamps* noted that the defendant did not seek to invalidate the plea, the Attorney General omits a key context from the Supreme Court's discussion. "Stamps does not seek to put aside or withdraw his plea. *He does not urge that his plea was invalid when made*. Instead, he seeks relief because the law subsequently changed to his potential benefit. His appeal, then, does not attack the plea itself and does not require a certificate of probable cause." (*Stamps*, *supra*, 9 Cal.5th at p. 698, italics added.) The same applies here. Defendant does not contend his plea was invalid when made, but instead seeks retroactive application of a law to his benefit. He does not need a certificate to do so.

We also reject the Attorney General's claim there is insufficient evidence that defendant has a qualifying mental disorder. As previously noted, the psychologists' reports both stated defendant had a diagnosis of PTSD. While, as the Attorney General points out, one of the two psychologists concluded defendant no longer suffered from PTSD, there is no such conclusion in the other report. *Frahs* does not establish a high hurdle for a defendant retroactively entitled to possible diversion under section 1001.36. Since neither psychologist's report was prepared for a section 1001.36 proceeding, the fact that one of the two reports states defendant no longer suffers from a particular qualifying mental disorder does not deprive defendant of the opportunity to present a claim. Since the other report notes that he has a disorder, PTSD, which qualifies under section 1001.36, defendant is entitled to present his claim on remand.

The record here affirmatively shows defendant appears to suffer from at least one qualifying mental disorder. A conditional remand under *Frahs* is thus appropriate.

DISPOSITION

We conditionally reverse the judgment and remand to the trial court for an eligibility determination under section 1001.36. " 'If the trial court finds that

[defendant] suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If [defendant] successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that [defendant] does not meet the criteria under section 1001.36, or if [defendant] does not successfully complete diversion, then his convictions and sentence shall be reinstated.' [Citation.]" (*Frahs, supra*, 9 Cal.5th at p. 641.

/s/
BUTZ, J. *

We concur:

/s/
ROBIE, Acting P. J.

/s/
MURRAY, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.